**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSSEE**
**NASHVILLE DIVISION**

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| BENJAMIN A. GOFF, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 3:12-00713 |
| | ) | Judge Sharp |
| BROOK-HOLLOW CAPITAL, LLC and | ) | Magistrate Judge Brown |
| BROOK-HOLLOW FINANCIAL, LLC, | ) | |
| | ) | |
| Defendants. | ) | |

**PLAINTIFF BENJAMIN A. GOFF'S**
**RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

Plaintiff Benjamin A. Goff ("Goff"), by and through his attorneys, Frost Brown Todd LLC, respectfully submits this response to the motion to dismiss filed in the above-captioned action by defendants Brook-Hollow Capital, LLC ("Brook-Hollow Capital") and Brook-Hollow Financial, LLC ("Brook-Hollow Financial," and, together with Brook-Hollow Capital, "Defendants"), on August 6, 2012 ("Def. Mem.")

## PRELIMINARY STATEMENT

This action concerns Defendants' refusal properly to compensate Goff for services and business knowledge provided by Goff to both Defendants. Goff worked extensively for both Brook-Hollow Capital and Brook-Hollow Financial, both prior to and after entering into an Executive Employment Agreement with Brook-Hollow Capital in May 2011 (the "Employment Agreement").[1] Despite his hard work on Defendants' behalf, Goff was summarily terminated as President and CEO of Brook-Hollow Capital in breach of the Employment Agreement in January 2012.

[1] Although an unsigned version of the Employment Agreement was originally submitted with Goff's Complaint through a filing error, the fully executed version of the Employment Agreement was filed on August 14, 2012. *See* Docket Entry No. 10.

Defendants' arguments that they are not subject to personal jurisdiction in Tennessee have no merit. In fact, all of Brook-Hollow Capital's operations and its only full time executive, Goff, were located in Tennessee and both Defendants' products were marketed to Tennessee attorneys. Moreover, Goff's claims arise solely out of the work he performed for Defendants in Tennessee, such that specific jurisdiction is appropriate. Finally, Brook-Hollow Financial controlled Brook-Hollow Capital to such an extent that it is subject to personal jurisdiction under an agency or alter ego theory. These contacts, as detailed below, are more than sufficient to establish both general and specific personal jurisdiction over Defendants at the motion to dismiss stage.

With respect to Goff's claim for tortious interference, Brook-Hollow may not claim the protection of the affiliate privilege under Delaware law because Goff has adequately alleged that Brook-Hollow Financial's decision to cause Brook-Hollow Capital to breach the Employment Agreement was unrelated to the business interests of Brook-Hollow Capital. In addition, by alleging that the principals of Brook-Hollow Financial made misrepresentations on behalf of Brook-Hollow Capital in order to induce Goff to provide his business expertise to Defendants, including prior to execution of the Employment Agreement, Goff has sufficiently pled claims for fraud in the inducement and civil conspiracy. Thus, Goff respectfully requests that this Court deny Defendants' motion to dismiss in its entirety.

## STATEMENT OF FACTS

Goff has been a resident of the state of Tennessee for the past 21 years. *See* Declaration of Ben. A. Goff ("Goff Decl.") at ¶ 2. In December 2010, Goff was approached by Brian Michaels ("Michaels"), general counsel of Brook-Hollow Financial, about a business idea related to litigation financing. *Id*. at ¶ 4. Goff spoke with Michaels by telephone from Tennessee. *Id*. Subsequent to that initial call with Michaels, Goff had a second conference call with Michaels and Benjamin J. Etscheid ("Etscheid"), principal of Brook-Hollow Financial, to discuss plans to start a litigation funding company. *Id*. at ¶ 5. Goff also participated in that conference call from Tennessee. *Id*. Following that conference call, Goff began to work with Etscheid, Michaels, and others on a business plan and on fundraising. *Id*.

The business plan developed by Goff, Etscheid, Michaels and other individuals from Brook-Hollow Financial was to provide attorneys with an opportunity to defer attorney's fees through Brook-Hollow Financial and affiliates, while receiving money immediately in the form of a loan from a yet to be formed company, Brook-Hollow Capital. *Id*. at ¶ 6. Prior to the creation of Brook-Hollow Capital on or about April 26, 2011, Goff attended several conferences on behalf of Brook-Hollow Financial in order to gather business intelligence and present information about Brook-Hollow Capital. *Id*. at ¶ 7. Etscheid represented on behalf of Brook-Hollow Financial that Goff would be compensated for his work and presentations at these conferences when Brook-Hollow Capital (or an equivalent) was actually formed. *Id*.

Goff entered into the Employment Agreement with Brook-Hollow Capital on or about May 1, 2011, with Etscheid signing on behalf of Brook-Hollow Capital. *Id*. at ¶ 8. Goff signed the Employment Agreement in Tennessee. *Id*. Teresa L. Goff, Goff's wife, witnessed his signature in Tennessee. *Id*. Goff received his compensation from Brook-Hollow Capital in Tennessee and all payroll taxes and reporting for his employment at Brook-Hollow Capital were done in Tennessee on a quarterly basis. *Id*. at ¶ 9. Under the terms of the Employment Agreement, Goff held the titles of Chief Executive Officer and President of Brook-Hollow Capital until January 19, 2012, when Goff was informed that he was terminated without cause, effective immediately. *Id*. at ¶ 10. As President and CEO, Goff had sole responsibility for the operations of Brook-Hollow Capital. *Id*. at ¶ 11. In fact, Goff was the only full time employee of Brook-Hollow Capital. *Id*.

All of Brook-Hollow Capital's operations were located in Tennessee. *Id.* Goff's office as CEO and President of Brook-Hollow Capital was located in his home in Brentwood, Tennessee. *Id.* at ¶ 12. Goff personally contracted for all necessary services, including credit bureau access, accounting, and contact management services. *Id.* Goff paid for these services and all other expenses associated with his work for Brook-Hollow Capital and Brook-Hollow Financial with a credit card, the billing address for which was his home address in Brentwood, Tennessee. *Id.* Goff was reimbursed for all such expenses by either Brook-Hollow Financial or Brook-Hollow Capital. *Id.* From his home office, Goff hosted online video conferences with Brook-Hollow Capital and Brook-Hollow Financial personnel, and communicated extensively both internally and with potential customers and clients by telephone and email. *Id.*

Although he was employed directly by Brook-Hollow Capital, Goff marketed the products of both Brook-Hollow Capital and Brook-Hollow Financial together as a package to attorneys nationwide out of his home office. *Id.* at ¶ 13. In particular, Goff marketed the products of both Brook-Hollow Capital and Brook-Hollow Financial to attorneys located in Tennessee in one-on-one meetings and at conferences. *Id.* at ¶ 14. Goff had marketing meetings with Nashville attorneys, as well as calls with officers of the Tennessee Association for Justice, regarding the products of Brook-Hollow Financial and Brook-Hollow Capital. *Id.* Goff kept Brook-Hollow Financial and Brook-Hollow Capital fully informed of his marketing activities in Tennessee, including providing reports at weekly marketing conference calls with personnel from Brook-Hollow Financial who were responsible for coordinating marketing for both entities. Goff was never instructed by anyone associated with Brook-Hollow Financial or Brook-Hollow Capital that he was not to market to Tennessee attorneys.. *Id.*

Both Brook-Hollow Financial and Brook-Hollow Capital intended to conduct business in Tennessee. *Id.* at ¶ 15. Although Brook-Hollow Capital was not an Industrial Loan & Thrift in

Tennessee during the time that Goff was employed there, Brook-Hollow Capital and Brook-Hollow Financial were permitted to market their products in Tennessee and engage in some limited loan transactions. *Id*. The decision was made, on Goff's advice, that Brook-Hollow Capital should apply to be licensed as a Tennessee Industrial Loan & Thrift only after Tennessee customers were identified. *Id.*

Goff was also responsible for underwriting, creating, and reviewing all credit packages for loans extended by Brook-Hollow Capital. *Id.* at ¶ 16. Invoices for pulling credit bureaus through Goff's membership with the National Association of Credit Management on behalf of Brook-Hollow Capital, which he submitted to Etscheid for reimbursement, reflect Goff's home address in Brentwood, Tennessee, as Brook-Hollow Capital's business address. *Id*. Prior to Goff's termination in January 2012, Brook-Hollow Financial and Brook-Hollow Capital completed one sale to an attorney located in Massachusetts. *Id.* at ¶ 17. This sale included both a fee deferment product through Kenmare Assignment Company ("Kenmare"), for whom Brook-Hollow Financial acts as exclusive broker, and a corresponding loan from Brook-Hollow Capital. *Id*. All operations functions including underwriting, invoicing and collection in regard to this loan were performed in Tennessee. *Id*. Brook-Hollow Financial was paid a fee for this transaction by Kenmare. *Id.*

Brook-Hollow Financial and Brook-Hollow Capital were managed as one company by Etscheid, Dan McCarthy ("McCarthy"), and the other officers and members of Brook-Hollow Financial. *Id*. at ¶ 18. Brook-Hollow Financial is the managing partner and majority owner of Brook-Hollow Capital. *Id*. All fees and revenue generated by Brook-Hollow Capital and Brook-Hollow Financial were controlled by Etscheid and McCarthy. *Id*. at ¶ 19. Etscheid and McCarthy structured the flow of revenue to be generated by Brook-Hollow Capital for their own personal benefit and the benefit of Brook-Hollow Financial, and frequently moved funds between Brook-Hollow Capital, Brook-Hollow Financial and other related entities at will in order to cover payroll and other expenses. *Id.* For example, while negotiating Brook-Hollow Capital loan origination fees with a prospective client, Etscheid and McCarthy drafted documents proposing that the prospective client pay the fees to Brook-Hollow Financial instead of Brook-Hollow Capital. *Id.* In addition, the offering materials provided to Brook-Hollow Capital investors stated that Etscheid was to receive $12,500 from Brook-Hollow Capital because of his position at Brook-Hollow Financial. *Id.*

The products of Brook-Hollow Capital and Brook-Hollow Financial were marketed together as a package, as directed by Brook-Hollow Financial, using the same marketing materials for both products. *Id.* at ¶ 20. Brook-Hollow Capital did not have a separate marketing department and relied on Brook-Hollow Financial to coordinate marketing activities. *Id.* Both Brook-Hollow Financial and Brook-Hollow Capital marketed their products to Tennessee attorneys, including at American Association for Justice conferences and Mass Torts Made Perfect. *Id.* In addition to relying on Brook-Hollow Financial employees for marketing coordination, individuals employed by Brook-Hollow Financial acted as Brook-Hollow Capital's Chief Financial Officer and legal counsel. *Id.* at ¶ 21.

## ARGUMENT

### I. Defendants are subject to personal jurisdiction in Tennessee.

Personal jurisdiction over Brook-Hollow Capital and Brook-Hollow Financial is appropriate because both Defendants have sufficient minimum contacts with Tennessee so that they "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Minimum contacts exist where, as here, a defendant "purposefully avails itself of the privilege of conducting activities within the forum state." *Smartvue Corp. v. Mistral Software Pvt. Ltd.*, No. 3:11-1145, 2012 WL 3000144, *2 (M.D.

Tenn. July 23, 2012) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). "[P]arties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King Corp.*, 471 U.S. at 473 (internal quotation omitted).

Jurisdiction over Brook-Hollow Capital and Brook-Hollow Financial is appropriate under both general and specific theories of personal jurisdiction. General jurisdiction is appropriate because Defendants' contacts with Tennessee "are so 'continuous and systematic' as to render [Defendants] essentially at home in the forum state." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). Specific jurisdiction is appropriate because each of Goff's claims "arise out of or relate to [Defendants'] contacts with the forum." *Fortis Corporate Ins. v. Viken Ship Mgmt.*, 450 F.3d 214, 218 (6th Cir. 2006) (internal quotation omitted).

The Sixth Circuit has established a three part test for determining whether specific jurisdiction is appropriate, requiring: "(1) purposeful availment 'of the privilege of acting in the forum state or causing a consequence in the forum state,' (2) a 'cause of action . . . aris[ing] from activities' in the state, and (3) a 'substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.'" *Schneider v. Hardesty*, 669 F.3d 693, 701 (6th Cir. 2012) (quoting *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381-82 (6th Cir. 1968). If the first two *Mohasco* requirements are met, an inference arises that the third requirement has been satisfied, requiring a defendant to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. As demonstrated below, Defendants have provided no such compelling reason and all three criteria are satisfied as to both Brook-Hollow Capital and Brook-Hollow Financial.

In deciding Defendants' motion to dismiss for lack of personal jurisdiction, unless the Court determines that an evidentiary hearing is necessary, the Court "must consider the pleadings and affidavits in the light most favorable to the plaintiff." *See Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980) (internal quotation omitted). At this stage, Goff need only make a *prima facie* showing that personal jurisdiction exists. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 449 (6th Cir. 2012).

A. Brook-Hollow Capital is subject to personal jurisdiction in Tennessee.

The Court has personal jurisdiction over Brook-Hollow Capital under both general and specific theories of personal jurisdiction. In the first instance, Brook-Hollow Capital's contacts with Tennessee, through the establishment of its operations and marketing of its products there, are sufficiently continuous and systematic so as to justify general personal jurisdiction. *See Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) (stating that a defendant may be found to direct its business to residents of a forum state by "indicat[ing] an intent or purpose to serve the market in the forum State," including by, for example, marketing defendants' product in the forum state through a distributor); *Carroll v. Blumaq Corp.*, No. 3:09-cv-216, 2009 WL 3784608, *2 (E.D. Tenn. Nov. 10, 2009) (finding general jurisdiction over defendant Florida corporation based on establishment of a Tennessee branch office).

Brook-Hollow Capital's Chief Executive Officer and President – Goff – was located in Tennessee. Goff Decl. at ¶ 12. As Brook-Hollow Capital's only full-time employee, Goff performed all operations functions for Brook-Hollow Capital out of his home office in Brentwood, Tennessee, as described above. *Id.* at ¶ 11-12. He hosted online video conferences with Brook-Hollow Capital and Brook-Hollow Financial personnel, and communicated extensively both internally and with potential customers and clients by telephone and email. *Id.* at ¶ 12. In addition, Goff marketed loans from Brook-Hollow Capital to Tennessee attorneys, both in one-on-one meetings and at conferences held in Tennessee. *Id.* at ¶ 14. Goff kept Brook-Hollow Financial and Brook-Hollow Capital fully informed about his marketing activities and was never instructed not to market to Tennessee attorneys. *Id.* Given that Brook-Hollow Capital signed a three year Employment Agreement with Goff, a 21-year resident of Tennessee, such ties cannot be considered random, fortuitous or attenuated.

Even if general jurisdiction does not apply, specific personal jurisdiction is appropriate because Goff's claims arise directly out of his employment with Brook-Hollow Capital in Tennessee. *See, e.g., McKee v. Meltech, Inc.*, No. 10-2730, 2011 WL 1770461, *3 (W.D. Tenn. May 9, 2011) (holding that employment contract with Tennessee resident for services to be performed in Tennessee was sufficient to establish personal jurisdiction); *Carroll v. Blumaq Corp.*, No. 3:09-cv-216, 2009 WL 3784608, *2 (E.D. Tenn. Nov. 10, 2009) (holding that personal jurisdiction was appropriate where plaintiff's causes of action were related to employment in defendant's Tennessee branch office); *Cummins v. K-Mart, Inc.*, 635 F. Supp. 122, 124-25 (N.D. Tenn. 1986) (finding personal jurisdiction based on plaintiffs' employment by and provision of services to defendant in Tennessee).

The Employment Agreement at the heart of this dispute is between Brook-Hollow Capital and a Tennessee resident. Goff Decl. at ¶ 2, 8. Goff was in Tennessee when he signed the employment agreement and resided in Tennessee for the entire time he was employed by Brook-Hollow Capital. *Id.* He performed the vast majority of his work for Brook-Hollow Capital from his home office in Brentwood, Tennessee. *Id.* at ¶ 12. Goff received his compensation from Brook-Hollow Capital in Tennessee. *Id.* at ¶ 9. All payroll taxes for Goff were paid in Tennessee and all other employment-related reporting reflected Goff's status as a Tennessee resident. *Id.* The contacts detailed above are more than sufficient to establish that Brook-Hollow Capital purposefully availed itself of the privilege of acting in Tennessee, that Goff's claims arise from Brook-Hollow Capital's activities in Tennessee, and that the Court's exercise of jurisdiction over Brook-Hollow Capital is reasonable.

None of the cases relied upon by Defendants consider whether personal jurisdiction over a defendant with employees actually located in the forum state is appropriate. And certainly none of the cases relied upon by Defendants concern a dispute between a defendant corporation and its CEO, President and only employee based in the forum state. For example, in *Calphalon Corp. v. Rowlette*, 228 F.3d 718 (6th Cir. 2000), as with almost all of the cases cited by Defendants, the dispute was between two parties with an independent contractual relationship, not between an employee and employer. In *Conti v. Pneumatics Products Corp.*, 977 F.2d 978 (6th Cir. 1992), the court was asked to consider whether the defendant corporation's correspondence with a prospective employee while he was still living in the forum state was sufficient to subject the defendant to personal jurisdiction. The court in *Conti* held that it lacked personal jurisdiction because the defendant's correspondence solely concerned defendant's recruitment of the plaintiff to work in the defendant's home state. *Id.* at 982. Neither of these decisions is remotely relevant to this dispute.

B. Brook-Hollow Financial is subject to personal jurisdiction in Tennessee.

Brook-Hollow Financial also has sufficient contacts with Tennessee to establish personal jurisdiction. Specifically, Goff marketed Brook-Hollow Financial's fee deferment product to attorneys in Tennessee with Brook-Hollow Financial's knowledge and approval. *See* Goff Decl. at ¶ 14; *Asahi*, 480 U.S. at 112. In addition, the tort claims brought against Brook-Hollow Financial allege harm purposefully directed toward a Tennessee resident in connection with Goff's business activities in Tennessee. *See Calder v. Jones*, 465 U.S. 783 (1984) (finding personal jursdiction based on purposeful actions of defendant aimed at the forum state with intent to cause harm there); *see also Air Products and Controls, Inc. v. Safetech Int'l, Inc.*, 503

F.3d 544, 552 (6th Cir. 2007) (holding that "the existence of intentional tortious conduct nonetheless 'enhances' a party's other contacts with the forum state for purposes of a purposeful availment analysis," despite noting narrowing of the *Calder* effects test) (internal quotation omitted). Goff has sufficiently alleged that Brook-Hollow Financial and its principals, including Etscheid and McCarthy, were fully aware of Goff's Tennessee residency, the Employment Agreement, and Goff's extensive work on behalf of both Brook-Hollow Capital and Brook-Hollow Financial. *See* Complaint at ¶¶ 55-59; Goff Decl. at ¶¶ 5, 8, 9, 12, 19.

Even setting aside Brook-Hollow Financial's direct ties with Tennessee and dealings with Goff, Brook-Hollow Financial is subject to personal jurisdiction based on Brook-Hollow Capital's connections with Tennessee. "The actions of one corporation may serve as the basis for personal jurisdiction over a related corporate entity '(1) when one corporation is acting as an agent for the other or (2) when the two corporations are essentially alter egos of each other.'" *Hilani v. Greek Orthodox Archdiocese of America*, No. 11-2993, 2012 WL 1900659, *6 (W.D. Tenn. May 24, 2012) (quoting *Gordon v. Greenview Hospital, Inc.*, 300 S.W.3d 635, 652 (Tenn. 2009). Both agency and alter ego relationships are characterized "by the parent corporation's control of the subsidiary corporation's internal affairs . . . ." *Gordon*, 300 S.W.3d at 653.

As detailed above, Etscheid and McCarthy administered Brook-Hollow Financial and Brook-Hollow Capital as if they were a single entity. Goff Decl. at ¶ 18. They routinely structured fees and revenue that should have remained with Brook-Hollow Capital so as to benefit Brook-Hollow Financial and themselves personally, and moved funds at will between entities in order to cover payroll and other expenses. *Id*. at ¶ 19. Moreover, Brook-Hollow Financial coordinated joint marketing for both Defendants and supplied legal and financial personnel for Brook-Hollow Capital. *Id*. at ¶¶ 20-21. Given both the direct ties between Brook-Hollow Financial and Tennessee generally and as related to Goff's allegations of wrongdoing, and the alter ego/agency relationship between Brook-Hollow Financial and Brook-Hollow Capital, personal jurisdiction over Brook-Hollow Financial is well warranted.

## II. Goff's Employment Agreement is fully executed and enforceable.

Defendants argue that Goff's Employment Agreement is not enforceable because the version originally attached to the Complaint as Exhibit A did not contain Goff's signature. *See* Def. Mem. at 11-13, 16. Through a filing error, the Complaint inadvertently attached an incorrect version of the Employment Agreement. This filing error has now been corrected, and the fully executed Employment Agreement, reflecting the signatures of both Goff and his wife, Teresa L. Goff, as witness, has been filed and served through the Court's Electronic Case Filing system. *See* Docket Entry No. 10. Therefore, Defendants' arguments premised on Goff's failure to execute the Employment Agreement are moot. In particular, given Goff's demonstration above of personal jurisdiction over Brook-Hollow Capital, Defendants' motion to dismiss as to Goff's first claim against Brook-Hollow Capital for breach of the Employment Agreement must be denied because it is premised solely on Goff's alleged failure to sign the Employment Agreement. *See* Def. Mem. at 11-13.

## III. Goff has sufficiently pled claims for tortious interference, fraudulent inducement and conspiracy.

In order to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a plaintiff is merely required to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In interpreting Rule 8(a)(2), the Supreme Court has held that a complaint need only allege "sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Goff's Complaint contains more than sufficient allegations to meet this low pleading standard for his claims alleging tortious interference with the Employment Agreement, fraud in the inducement and civil conspiracy.

A. Goff's Complaint adequately pleads a claim against Brook-Hollow Financial for tortious interference with the Employment Agreement.

Defendant's motion to dismiss Goff's claim against Brook-Hollow Financial for tortious interference with the Employment Agreement is based solely on application of the so-called affiliate privilege under Delaware law. The affiliate privilege "shields companies affiliated through common ownership from tortious interference with contract claims when the companies act in furtherance of their shared legitimate business interests." *James Cable, LLC v. Millenium Digital Media Sys., L.L.C.*, No. 3637-VCL, 2009 WL 1638634, at *4 (Del. Ch. June 11, 2009). However, the affiliate privilege provides no protection when, as in this case, a plaintiff pleads that a defendant was "motivated by some malicious or other bad faith purpose." *Id.* Allegations that a parent corporation's control of an affiliate is not aimed at shared profitability are sufficient to prevent application of the affiliate privilege shield at the motion to dismiss stage. *See Global Recycling Solutions, LLC v. Greenstar N.J., LLC,* No. 09-976-LPS, 2011 WL 4501165, *10 (D. Del. Sept. 28, 2011).

Here, Goff has alleged that Etscheid and McCarthy used Brook-Hollow Financial's position as managing partner of Brook-Hollow Capital to control fees and revenue due to Brook-Hollow Capital for their personal benefit and for the benefit of Brook-Hollow Financial. Etscheid and McCarthy, as principals of Brook-Hollow Financial, were ultimately responsible for the decision to terminate Goff and cause Brook-Hollow Capital to breach the terms of the Employment Agreement. This decision was entirely motivated by Etscheid's and McCarthy's personal financial interests, and was unrelated to the business interests of Brook-Hollow Capital. Defendants' motion to dismiss Goff's tortious interference claim must be denied because Goff has adequately pled a bad faith purpose for Brook-Hollow Financial's interference with the Employment Agreement.

B. Goff's Complaint adequately pleads claims for fraud in the inducement and civil conspiracy.

Defendants' only remaining basis for dismissal of Goff's fraud in the inducement claim is that this claim is based entirely on their breach of the Employment Agreement. However, at the motion to dismiss stage, fraud claims may survive even where the "factual bases underlying plaintiff's fraud and contract claims clearly overlap." *Nortel Networks, Inc. v. Communications Test Design, Inc.*, No. 09-10138, 2011 WL 1100983, *6 (D. Del. Mar. 22, 2011) (quoting *Polymer Dynamics, Inc. v. Bayer Corp.*, No. Civ. A. 99-4040, 2000 WL 1146622, *6 (E.D. Pa. Aug. 14, 2000)). Here, Goff has adequately alleged that Etscheid, McCarthy, and others made misrepresentations on behalf of Brook-Hollow Capital in order to induce Goff to engage in extensive work on behalf of Defendants, both before and after the creation of Brook Hollow Capital. The mere fact that much of Goff's performance was pursuant to the Employment Agreement is not a proper basis for dismissal.

Because Goff has adequately pled claims against Defendants for tortious interference with the Employment Agreement and fraud in the inducement, as demonstrated above, Defendants' motion to dismiss Goff's civil conspiracy claim for failure to plead underlying wrongdoing must be denied.

## CONCLUSION

For the foregoing reasons, plaintiff Ben A. Goff respectfully requests that the Court deny Defendants' motion to dismiss in its entirety.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.01, it is hereby certified that service of a true and correct copy of the foregoing has been made upon the following Filing Users through the Electronic Case Filing System on this the 20th day of August, 2012:

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